No. 80-1725

JUN 1 19
ALEXANDER L. ST
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

BENNETT GOLDSTEIN AND JAMES EDWARD KERN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Katz v. *United States*, 389 U.S. 347 6

Turner v. *United States*, 396 U.S. 398 6

United States v. *Bronstein*, 521 F. 2d 459, cert. denied, 424 U.S. 918 ..... 4, 6

United States v. *Burns*, 624 F. 2d 95, cert. denied, No. 80-355 (Nov. 3, 1980) 4, 6, 7

United States v. *Dubrofsky*, 581 F. 2d 208 4

United States v. *Edwards*, 602 F. 2d 458 6

United States v. *Fulero*, 498 F. 2d 748 4

United States v. *Klein*, 626 F. 2d 22 ..... 3, 5

United States v. *Ramirez-Rodriguez*, 552 F. 2d 883, cert. denied, 430 U.S. 966 6

United States v. *Solis*, 536 F. 2d 880 4

United States v. *Sullivan*, 625 F. 2d 9, cert. denied, No. 80-5485 (Feb. 23, 1981) 4

United States v. *Van Leeuwen*, 397 U.S. 248 5-6

United States v. *Venema*, 563 F. 2d 1003 ..... 4, 6

Constitution and statutes:

United States Constitution, Fourth Amendment 1, 3

18 U.S.C. 2 ..... 1, 3

21 U.S.C. 841(a)(1) 1

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1725

BENNETT GOLDSTEIN AND JAMES EDWARD KERN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the use of a specially trained dog to smell their luggage in an airport baggage area violated their Fourth Amendment rights and that there was insufficient evidence to sustain their convictions.

1. Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Each was sentenced to six years' imprisonment, to be followed by a three-year special parole term, and fined $2,000. The court of appeals affirmed (Pet. App. A-1 to A-24).

The evidence at trial showed that petitioners attempted to transport approximately two pounds of cocaine from Orlando, Florida, to Washington, D.C. At about 6:45 a.m. on May 29, 1979, two DEA agents observed petitioner Kern

at the National Airlines ticket counter in the Orlando International Airport (Pet. App. A-2 to A-3). Within minutes, Daniel Lynch approached the same counter. He and Kern cast side glances toward each other but did not appear to speak to each other (*id.* at A-3). They left the ticket counter separately and then had a short conversation about Kern's inability to obtain two confirmed tickets to Washington, D.C. (*id.* at A-3 to A-4). Lynch left the area, and shortly thereafter Kern was joined by petitioner Goldstein, to whom Kern gave the larger of the two suitcases he was carrying (*id.* at A-4). Petitioners returned to the ticket counter, where DEA Agent Maroney lined up behind them (*ibid.*).

Agent Maroney saw the name "Ben Goldstein" on one bag and "James Kern" on the other. He also noticed, however, that petitioner Kern purchased the two tickets to Washington in the names of "M. Kern" and "J. Kern" (*id.* at A-4 to A-5). Petitioners checked the two bags and left the ticket counter.

His suspicions aroused, Agent Maroney arranged to have a specially trained police dog examine petitioners' and Lynch's luggage. Agent Maroney removed Lynch's two bags from the baggage cart and placed two decoy bags around them; he did the same with petitioners' two bags (*id.* at A-5). The police dog, which was trained to detect the presence of cocaine, heroin, and marijuana, reacted positively to petitioners' and Lynch's bags (*ibid.*).

As a result of the dog's response, DEA Agent Wingfield approached petitioners, identified himself as a police narcotics officer, and advised them that a narcotics-trained dog had reacted positively to their luggage. Petitioners refused to consent to a search of their bags. They were advised of their rights and were placed under arrest (*id.* at A-6 to A-7).[1]

---

[1]At the same time, Agent Maroney was questioning Lynch, who consented to a search of his luggage. A small amount of marijuana

Petitioners were taken to the airport police office. When the police dog arrived, it began sniffing petitioners' bags without any prompting and again alerted to the presence of drugs (Pet. App. A-7 to A-9). Petitioner Kern then consented to a search of his bag, which revealed $11,800 in cash, a bottle with oil residue, some small straws, a glass beaker, a stand and the top portion of a butane torch, a thermometer, and a few items of clothing and newspapers. A subsequent search of petitioner Goldstein's bag, conducted pursuant to a warrant, revealed approximately two pounds of cocaine, $2,415 in cash, a few pieces of clothing, and a boarding pass for the previous day's flight from Washington to Ft. Lauderdale, Florida (*id.* at A-9).

Prior to trial, petitioners moved to suppress the fruits of the searches of their luggage. The district court denied this motion, and the court of appeals thereafter affirmed their convictions (Pet. App. A-1 to A-24). The court of appeals reasoned (*id.* at A-12 to A-19) that the use of the dog to sniff petitioners' bags did not constitute a search because petitioners had no reasonable expectation of privacy in the air surrounding their bags.

2. Petitioners contend (Pet. 6-25) that the dog's sniffing of their luggage amounted to a "search," and that the search was improper because the DEA agents lacked an articulable, reasonable suspicion for conducting it.

As the court below recognized (Pet. App. A-12 to A-13), the courts of appeals uniformly have held that the use of a trained dog to sniff the airspace around luggage does not constitute a search within the meaning of the Fourth Amendment. See *United States* v. *Klein*, 626 F. 2d 22,

---

residue was found in the bottom of each of his bags, along with $2,500 in cash in one and a chemical test kit in the other. Lynch was not charged with any crime and was released (Pet. App. A-7 n.2).

26-27 (7th Cir. 1980); *United States* v. *Sullivan*, 625 F. 2d 9, 13 (4th Cir. 1980), cert. denied, No. 80-5485 (Feb. 23, 1981); *United States* v. *Burns*, 624 F. 2d 95, 101 (10th Cir. 1980), cert. denied, No. 80-355 (Nov. 3, 1980); *United States* v. *Venema*, 563 F. 2d 1003, 1005-1006 (10th Cir. 1977); *United States* v. *Solis*, 536 F. 2d 880, 881 (9th Cir. 1976); *United States* v. *Bronstein*, 521 F. 2d 459, 461 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976); *United States* v. *Fulero*, 498 F. 2d 748, 749 (D.C. Cir. 1974). See also *United States* v. *Dubrofsky*, 581 F. 2d 208, 211 (9th Cir. 1978), and cases cited therein. Indeed, as the Second Circuit noted in *United States* v. *Bronstein, supra*, 521 F. 2d at 461:

> If the police officers here had detected the aroma of the drug through their own olfactory senses, there could be no serious contention that their sniffing in the area of the bags would be tantamount to an unlawful search. * * * We fail to understand how the detection of the odoriferous drug by the use of the sensitive and schooled canine senses here employed alters the situation and renders the police procedure constitutionally suspect.

This conclusion is clearly correct in the circumstances of this case. The use of a dog was a reasonable and minimally intrusive investigative technique. The dog merely sniffed around the bag, neither penetrating it nor revealing its contents except insofar as it detected the cocaine. It completed its task swiftly, without inconveniencing petitioners. In contrast to a conventional search, which exposes private matter to governmental view, an investigative technique of this sort has little potential for unjustifiable invasion of personal privacy—either the dog will not "alert" to the item it is smelling, in which case there is absolutely no incursion into privacy, or it will "alert," thereby giving specific information about criminal activity without simultaneously exposing to the government any lawful, private affairs or possessions of the individual.

After the dog's alert supplied probable cause to believe illicit drugs were in the bags, petitioner Kern's bag was searched only with his consent, and petitioner Goldstein's bag was not searched until a warrant was obtained. Accordingly, the court below correctly determined that petitioners' rights were not violated by the agents' use of the dog.

Petitioners' contention that the decision below conflicts with *United States* v. *Klein, supra,* is without merit. Whereas the use of the dog in *United States* v. *Klein* would have required the officers to detain the luggage after the defendants had left the airline terminal (626 F. 2d at 25), the use of the dog in the present case apparently took place while petitioners were still at the airport gate awaiting their flight. As noted above, petitioners thus were in no way inconvenienced by the agents' use of the dog. Moreover, while the *Klein* court did find that the agents had reasonable suspicion to detain the defendants' bags (*id.* at 26) and the court below held (Pet. App. A-13) that such a finding was unnecessary, this creates no inconsistency between the two cases, both of which upheld admission of challenged evidence. In the first place, there was no explicit holding in *Klein* that reasonable suspicion is required before law officers may subject luggage to a dog's sniffing. Moreover, many of the factors on which the court in *Klein* relied to find reasonable suspicion—departure from a source city, buying a one-way ticket under an assumed name and attempts by the defendants to appear not to know one another—are also present in this case. Indeed, the court below noted (Pet. App. A-19 n.10) that the factors present here "would probably meet the reasonable suspicion standard."[2]

---

[2] *United States* v. *Van Leeuwen,* 397 U.S. 248 (1970), is clearly distinguishable. In that case, in which the Court found reasonable suspicion that justified postal officials' detention of two packages, this Court, like the Seventh Circuit in *United States* v. *Klein, supra,* did not

3. Nor is there any merit to petitioners' claim (Pet. 25-33) that the evidence at trial failed to show that they intended to distribute cocaine. They can point to no case that supports their position, and, as both courts below recognized, the record belies their claim. Not only did petitioners possess approximately two pounds of cocaine—an amount that the jury could only have concluded far exceeded what they could use themselves—but, in addition, their luggage contained a butane torch and stand, a glass beaker, and a substantial amount of cash. Furthermore, their manner of travel, including only an overnight stay and petitioner Goldstein's use of a ticket in an assumed name, also supports the jury's finding. Accordingly, there was overwhelming evidence to sustain petitioners' convictions. See *United States* v. *Burns, supra*, 624 F. 2d at 101-102; *United States* v. *Edwards*, 602 F. 2d 458, 470 (1st Cir. 1979); *United States* v. *Ramirez-Rodriguez*, 552 F. 2d 883, 884-885 (9th Cir. 1977), cert. denied, 430 U.S. 966 (1978).[3]

---

explicitly hold that such a finding was necessary. Moreover, the detention of the packages that was challenged in *Van Leeuwen* was for a period of 29 hours (397 U.S. at 252-253).

Nor is *Katz* v. *United States*, 389 U.S. 347 (1967), inconsistent with the decision below. The dog merely sniffed the airspace around the luggage; it did not delve into the contents of the luggage. Consequently, petitioners' expectation of privacy in the contents of the luggage was honored. Only that which was exposed to the public—the odor—was intercepted. See *United States* v. *Venema, supra*, 563 F. 2d at 1005-1006; *United States* v. *Bronstein, supra*, 521 F. 2d at 461-462.

[3]Contrary to petitioners' contention (Pet. 31-33), the decision below is not at odds with this Court's decision in *Turner* v. *United States*, 396 U.S. 398 (1970). *Turner* merely held that an intent to distribute could not be inferred from possession of a very small amount (less than one gram) of cocaine. 396 U.S. at 401, 423. Here, by contrast, petitioners' bags concealed more than 559 grams—a very large amount—of pure cocaine.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981

DOJ-1981-05